MARTIN GUTIERREZ	:	BEFORE THE
Appellant	:	HOWARD COUNTY
vs.	:	BOARD OF APPEALS
DEPARTMENT OF PLANNING AND ZONING HOWARD COUNTY, MARYLAND	:	HEARING EXAMINER
	:	BA Case No. 562-D
Appellee		

::

IN THE MATTER OF	:	BEFORE THE
MARTIN GUTIERREZ	:	HOWARD COUNTY
	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 05-49V

::

DECISION AND ORDER

On April 10, 2006, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the administrative appeal and variance petition of Martin Gutierrez (the "Appellant"). The Appellant is appealing from a Zoning Violation Formal Notice issued by the Howard County Department of Planning and Zoning ("DPZ") dated March 16, 2006. The Notice notified the Appellant that the property located at 6166 Montgomery Road, Elkridge, Maryland (the "Property") is in violation of Sections 108.2.B and C, and 128.A.4.a of the Howard County Zoning Regulations (the "Regulations").

The Appellant is also requesting a variance from Section 128.A.4.a to reduce the required 200-foot setback from an existing dwelling to 155 feet for a hen house located in a an R-20 (Residential - Single) Zoning District, filed pursuant to Section 130.B.2 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Appellant certified that notice of the hearing was advertised and that the subject property was posted as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Neither the Appellant nor DPZ were represented by counsel. Curtis Braithwaite testified on behalf of DPZ. Martin Gutierrez testified on his own behalf.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. The Property, known as 6166 Montgomery Road, is located in the First Election District on the south side of Montgomery Road about 700 feet west of Bellanca Drive in Elkridge. It is identified on Tax Map 37, Block 4 as Lot 4 of Parcel 210 and is located in the R-20 zoning district. The Property is an irregularly shaped parcel consisting of about 0.459 acres. The Property is about 134 feet wide at its southern end and narrows to about 70 feet wide at its northern end. The Property is about 200 feet deep.

The Property is improved in its northwest portion with a 1½ story single-family dwelling. A detached garage building is located to the southwest of the house. The petition plan shows a large concrete pad directly behind the house. About 35 feet to the south of this pad is a 6' by 7' chicken coop, situated about 15 feet from the east side lot line.

2. Mr. Braithwaite, a zoning enforcement officer for DPZ, testified that he inspected the Property in September 2005 and observed the chicken coop and a large number of chickens on the Property. He observed that the chicken coop appeared to be less than 200 feet from the nearest dwelling, which is located to the south of the Property.

3. On November 16, 2005, DPZ issued to the Appellant a Zoning Violation Formal Notice citing as violations (1) the "illegal housing of farm animal (sic) on R-20 zoned property" in violation of Section 108.2 B&C, and (2) the "maintenance of an animal shelter including a building, shed, roofed structure or moveable shelter that houses or provides protection for animals other than household pets which fails to meet the 200 foot setback requirement from an existing neighboring dwelling on R-20 zoned property" in violation of Section 138.A.4.a.

4. On March 16, 2006, George Beisser, Chief of the Division of Public Service and Zoning Administration, issued a memorandum declaring that "the number of chickens allowed as an accessory use where permitted by the regulations as an accessory use will be a total of eight (8) chickens, ducks or other fowl." The memorandum states that in Carroll County it has been determined that the maximum number of chickens permitted as an accessory use in residential zones is six. The memorandum also states that the University of Maryland Agricultural Cooperative Exchange Service advised that the average laying chicken will normally lay one egg per day.

5. On the same date, DPZ issued to the Appellant a new Zoning Violation Formal Notice citing violation of the same two Regulations. The violation of Section 108.2.B&C is described as the "illegal housing or raising of more than eight chickens on a lot less than

40,000 square feet on R-20 zoned property." The same notice was re-issued on March 27, 2006.

5. The Appellant file a timely appeal on March 31, 2006. The Appellant also filed a variance petition to request a variance from the 200-foot setback requirement. In the appeal petition, the Appellant stated that he has kept a flock of 24 Araucuna chickens since 2004. The Appellant states that "we consider our chickens pets" and use the eggs only for family consumption. He stated that "contrary to popular belief, chickens do not lay an egg a day but egg production is linked to poultry genetics and light." According to the appeal petition, the particular breed of chickens that the Appellant raises produces fewer eggs than other chickens; he estimated that his 24 chickens lay an average of 8-10 eggs per day during the spring and summer months, and fewer during the fall and winter. He stated that his daughter is a vegetarian and the eggs provide her with protein in her diet. The petition also states that the chicken coop is about 155 feet from the dwelling to the south.

6. In his testimony, the Appellant stated that, at most, he gets 12 eggs per day from his 24 chickens. He also stated that he will move the chicken coop so that it is at least 200 feet from the nearest existing dwelling.

CONCLUSIONS OF LAW

A. Administrative Appeal: Counting Your Chickens.

1. Section 130.A.3 of the Zoning Regulations authorizes appeals of DPZ decisions, including violation notices:

"Appeals to the Hearing Authority Board of Appeals may be taken by any person aggrieved, or by any officer, department, board or bureau of the County affected by any decisions of the Department of Planning and Zoning. Such appeal shall be filed not later

than 30 days from the date of the action of the Department of Planning and Zoning and shall state the reasons for the appeal."

2. Rule 10.2(b) of the Hearing Examiner Rules of Procedure provides in pertinent part that "in an appeal of an administrative agency's issuance of a violation of a County law or regulation, the agency must show by a preponderance of evidence that the respondent has violated the law or regulation in question. The respondent must prove all affirmative defenses, such as nonconforming use, by a preponderance of the evidence."

3. In this case, there is no dispute that the Appellant maintains 24 chickens on his R-20 zoned lot (a lot that is less than 40,000 square feet in area). There is also no dispute that the chicken coop on the Property is less than 200 feet from the nearest existing dwelling. With respect to this second fact, the Appellant fairly concedes that the chicken coop is in violation of Section 128.A.4.a; indeed, the Appellant has offered to correct the violation by moving the coop to a location at least 200 feet from the neighboring home. Consequently, the appeal, with respect to this second violation, is denied.

4. With respect to the first charge, the issue is one of interpretation of the Zoning Regulations. Section 108.B, which lists those uses permitted as a matter of right in the R-20 zone, includes in paragraph 2:

> "Farming, provided that on a lot of less than 40,000 square feet, no fowl *other than for the normal use of the family residing on the lot* and no livestock are permitted (italics added)."

The question, then, is whether the Appellant's maintenance of 24 chickens on his R-20 Property constitutes the "normal use of the family residing on the lot" within the meaning of Section 108.B.2.

The cardinal rule of statutory construction is to ascertain and carry out the real intention of the legislature. The primary source from which we glean this intention is the

language itself. We first accord the words their ordinary and natural signification. We must also consider the context in which the provision appears and interpret it in the context of the entire statutory scheme. If the words of a provision are ambiguous, i.e., "reasonably capable of more than one meaning" – that is, their meaning is intrinsically unclear or their application to a particular object or circumstance is uncertain – then resort may be made to surrounding circumstances such as legislative history and prior case law. The effort is to discern the meaning and effect of the language in light of the objectives and purposes of the provision enacted. Such an interpretation must be reasonable and consonant with logic and common sense. *The Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514 (2003).

When it comes to raising chickens, what is *normal* use? The word "normal" is defined as "conforming with, adhering to, or constituting a norm, standard, pattern, level, or type; typical." *The American Heritage® Dictionary of the English Language, Fourth Edition Copyright © 2000 by Houghton Mifflin Company.* Typically in America, chickens are raised on farms for their eggs or to be slaughtered for food. Occasionally, chickens are also kept as pets. This practice has grown in recent years as many suburban families have begun raising a small number of chickens in their back yards. *See* "Scratch a Suburb, Find a Chicken," The New York Times, August 11, 2005.

Zoning laws, which are designed to segregate incompatible uses, generally restrict the keeping of chickens in urban or suburban areas. "Today, some cities in the United States still allow residents to keep live chickens as pets, although the practice is quickly disappearing. Individuals in rural communities commonly keep chickens for both ornamental and practical value. Some communities ban only roosters, allowing the quieter hens." *See* http://en.wikipedia.org/wiki/Chicken#Chickens_as_pets.

The regulation of chickens in residential areas in America is multifarious. As the Appellant points out in his petition, some jurisdictions allow an unlimited number of chickens on residential lots; others impose an expressed limit on the number of chickens allowed – anywhere from 3 to 30; some require that the chickens be kept a minimum distance from neighboring lots or homes; while others ban chickens altogether.

The Howard County Zoning Regulations take yet a different approach. They do not assign a particular number to the limit of chickens allowed in the R-20 zone; rather, they restrict the number of chickens to those that can be "normally" used by the family residing on the lot. The standard is therefore meant to be somewhat flexible. What is normal or typical in one area or at one point in time may not necessarily be normal in another.

Does this also mean that what is normal for one family is not so for another? The Appellant argues that, because his daughter is a vegetarian, his family consumes more eggs than the typical family. He also suggests that, because the particular breed of his chickens lay fewer eggs than most, and because he limits the amount of light his chickens receive, he should be allowed to keep more of them. In other words, the Appellant would construe Section 108.B.2 to mean that he should be permitted to raise as many chickens as he and his particular family, under its particular circumstances, can personally use. To follow the Appellant's argument to its logical conclusion, before DPZ could determine the appropriate number of chickens for any particular residential lot, it would have to know at the minimum: (a) the number of people in the family, (b) the egg-eating habits of each member of the family, (c) the particular breed of chickens being raised by the family, (d) the egg-laying habits of the particular breed of chicken, and (e) the particular chicken-rearing techniques used by the particular family.

It is neither logical nor practical to make such fine distinctions when applying a zoning ordinance. "The purpose of the zoning law is to promote the health, safety, and general welfare of the public…. 'The very essence of zoning is territorial division according to the character of the land and ... [its] peculiar suitability for uses, *and uniformity of use within the zone*.' *Heath v. M. & C.C. of Baltimore*, 187 Md. 296, 305, 49 A.2d 799, 804 (1946) (emphasis added)." *Mayor & Council of Rockville v. Rylyns Enters*., 372 Md. 514, 531 (Md. 2002).

In the *Rylyns* case, the Maryland Court of Appeals described the nature of planning and zoning laws thusly:

> "In theory, and usually in practice, long study and consideration is given to the location of various human activities as they are distributed on the geographic plain, and analysis is made as to where particular types of growth are likely to occur, and where it would be best to allow growth to occur in reference to all of the other land use activities in the area or region in question. Ideally, growth then may be planned in a manner that allows for the expansion of economic activities and opportunities in the area or region for the benefit of its residents, while at the same time attempting to maintain the quality of life of the region, all without unduly disturbing the reasonable expectations of the citizenry as to the permissible uses they may make of real property. As is the case with most human endeavors, particularly those involving multiple and complex variables, the results of the planning and zoning process are sometimes less than perfect, particularly from the subjective point of view of the property owner who finds that his or her desired use for a property is different from that of the relevant planning and zoning authority."
>
> …. "'Zoning is concerned with dimensions and uses of land or structures ....' *Friends of the Ridge v. Baltimore Gas & Elec. Co*., 352 Md. 645, 655, 724 A.2d 34, 39 (1999). Euclidean zoning is a fairly static and rigid form of zoning …. As explained in *Rouse-Fairwood Dev. Ltd. P'ship v. Supervisor of Assessments for Prince George's County*, 138 Md. App. 589, 623, 773 A.2d 535, 555 (2001):
>
> > The term 'Euclidean' zoning describes the early zoning concept of separating incompatible land uses through the establishment of fixed legislative rules....' 1 ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING (4th Ed. Rev. 1994), § 1.01(c), at 1-20 ("Rathkopf's").

> Generally, by means of Euclidean zoning, a municipality divides an area geographically into particular use districts, specifying certain uses for each district. "Each district or zone is dedicated to a particular purpose, either residential, commercial, or industrial," and the "zones appear on the municipality's official zoning map." 5 Rathkopf's, § 63.01, at 63-1-2. In this way, the municipality 'provides the basic framework for implementation of land use controls at the local level.' 1 Rathkopf's, § 1.01(c), at 1-22.

> Euclidian zoning is designed to achieve stability in land use planning and zoning and to be a comparatively inflexible, self-executing mechanism which, once in place, allows for little modification beyond self-contained procedures for predetermined exceptions or variances. This relative inflexibility is reflected in the requirement, found in Art. 66B, § 4.02, of regulatory uniformity within zoning districts."

> …. "The impact of this presumption often has been felt to be unduly harsh to the landowner who finds that planned uses of a property are no longer allowed under the zoning classification into which the land has been placed. The presumption performs, however, and perhaps somewhat ironically, a critically essential function to the benefit of the property owner. Because zoning necessarily impacts the economic uses to which land may be put, and thus impacts the economic return to the property owner, the requirement that there be uniformity within each zone throughout the district is an important safeguard of the right to fair and equal treatment of the landowners at the hands of the local zoning authority. Frankly put, the requirement of uniformity serves to protect the landowner from favoritism towards certain landowners within a zone by the grant of less onerous restrictions than are applied to others within the same zone elsewhere in the district."

The Howard County Zoning Regulations, at least with regard to the R-20 zone, follows the Euclidean model. To read Section 108.B.2 to be as flexible as the Appellant propones, however, would be contrary to the concept of Euclidean zoning. Moreover, to give the regulation such a variable and undefined construction would run the risk of rendering the regulation arbitrary and capricious and in violation of due process of law. An excessively

malleable standard is in effect no standard at all, leaving undue discretion to the enforcing agency.[1]

I must assume that when the Howard County Council enacted Section 108.B.2, it intended to impose a uniform standard to restrict the use of chickens on a residential lot. Thus, the word "normal" was meant to apply to both the use and the circumstances of the family residing on the lot. The normal or typical uses of chickens on a residential lot are (1) as pets or (2) for the consumption of eggs by a typical family.

Ordinarily, a family may own one or several pets; rarely, if ever, does a family keep 24 animals of any kind on a residential lot. It is worthy to note that, when it comes to canines, the County Council has determined that keeping more than five dogs on any lot of less than 20 acres *for any purpose* is deemed a commercial dog kennel use, for which a conditional use is required. See Section 103.A.82.b. While chickens may not be as noisy or malodorous as dogs, clearly, if the legislature considers six dogs on a 20-acre lot to be excessive, then it stretches the imagination to think that the Council would condone 24 pet chickens on a residential lot of less than ½ acre.

Likewise, one cannot imagine that the Council anticipated that a residential lot owner would keep 24 chickens in order to feed the family. I must assume that the Council, like DPZ, was generally aware that the average chicken lays one egg per day. Conversely, the American Heart Association recommends that a person eat no more than 4 eggs per week. The average family certainly does not consume two dozen eggs a day.

In sum, I must conclude that, when the County Council restricted the use of chickens on residential lots to "normal use," it did not intend to allow a family to keep 24 chickens.[2]

[1] This is not to mention the administrative burden the Appellant's interpretation would place on DPZ in order to apply and enforce the law.

Consequently, I find that a preponderance of evidence shows that the Appellant has violated the regulation in question and that the Zoning Violation Formal Notice was properly issued. The appeal on this issue is therefore denied.

B. Variance: Flying the Coop.

In his testimony, the Appellant stated that he plans to move the chicken coop so that it is at least 200 feet from the nearest existing dwelling.[3] Consequently, the need for a variance is obviated. The variance petition is therefore dismissed.

[2] For the purposes of this appeal, I need not determine the precise number of chickens that can be permitted on a residential lot. While DPZ's determination to limit the number of chickens to eight appears generally reasonable and is deserving of considerable weight, I would caution against imposing such an inflexible standard - else the Council would have imposed it themselves. The proper limit may vary depending upon the size of the lot and the customary practices of the neighborhood.

[3] The fact that the Appellant is able to move the chicken coop to a spot outside of the setback suggests that he has no practical difficulty in complying with the setback requirement, rendering his chances of obtaining variance approval dubious at best.

ORDER

For the foregoing reasons, it is this **23rd day of May 2006**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the petition of appeal of Martin Gutierrez in BA Case No. 562-D is hereby **DENIED;** and it is further **ORDERED**:

That the petition of Martin Gutierrez in BA Case No. 05-49V for a variance from Section 128.A.4.a to reduce the required 200-foot setback from an existing dwelling to 155 feet for a hen house located in a an R-20 (Residential - Single) Zoning District is hereby **DISMISSED.**

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

_____
Thomas P. Carbo

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.